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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FRANK HARRIS, Defendant and Appellant.	B208790 (Los Angeles County Super. Ct. No. BA275578)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Frank Harris appeals from the judgment entered following a jury trial that resulted in his conviction of first degree murder of Sherman Clark and attempted premeditated murder of T.B.[1] He contends the trial court: (1) erred in denying his *Batson-Wheeler*[2] motion and (2) interfered with the jury's deliberations, denying him due process. We affirm.

FACTS[3]

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that defendant and his twin brother were members of the criminal street gang known as the 87 Gangster Crips. In August 2003, the 87 Gangster Crips began feuding with the gang known as the Avalon Garden Crips. Over the next several months, members of both gangs were shot and killed. In January 2004, members of the Avalon Garden Crips shot and killed defendant's twin brother. Retaliating members of the 87 Gangster Crips shot and killed a member of the Avalon Garden Crips in March 2004. The Avalon Garden Crips retaliated by fatally shooting two women associated with the 87 Gangster Crips.

At about 7:50 p.m. on November 11, 2004, police were dispatched to the corner of Avalon and 51st Streets, known as a gathering place for the Avalon Garden Crips, to investigate a shooting. The police found Sherman Clark's body in a restaurant parking lot; T.B., who had been shot in the foot, was inside the restaurant. Clark and T.B. were

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1 Defendant was charged by information with first degree murder and premeditated attempted murder; gun use (Pen. Code, § 12022.53, subds. (b), (c) & (d)) and gang (Pen. Code, § 186.22, subd. (b)(1)(A)) enhancements were alleged. After two hung juries resulted in mistrials, a third jury convicted defendant as charged and found true the enhancements. He was sentenced to 50 years to life in prison for the murder, plus a consecutive 25 years to life for the attempted murder. He filed a timely notice of appeal.

2 *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). In this opinion, we use the term "*Wheeler* motion."

3 Because the issues on appeal involve only jury selection and deliberation, a detailed recitation of the facts is unnecessary.

members of the Avalon Crips, although it was unclear whether they were members of the Avalon Garden Crips or some other subset.

The shooting was captured on the restaurant's security camera and the video was introduced into evidence. A detective showed the recording to various law enforcement officers. At the time, Officer Ben Perez was assigned to the Los Angeles Police Department's gang unit and was responsible for monitoring the activities of the 87 Gangster Crips. From the video, Perez identified defendant as the shooter. Detective Mark Hahn, the lead investigator in the murder of defendant's twin brother, also identified defendant as the shooter from the recording. When J.P. was interviewed about the shooting on December 9, 2004, J.P. had been living with his girlfriend (defendant's cousin) at defendant's grandparents' home for several years. During that time, J.P. had seen defendant occasionally. After looking at the recording, J.P. identified defendant as the shooter.

DISCUSSION

A. *The Trial Court Did Not Commit* Wheeler *Error*

Defendant contends the trial court erred in denying his *Wheeler* motion. As we understand his argument, it is twofold. First, the issue of whether a prima facie case of discrimination was made is moot because the trial court asked for and ruled on the prosecutor's reasons for challenging two female jurors. Second, the prosecutor's proffered explanation was a sham and the trial court failed to perform the requisite analysis. We find no error.

1. Wheeler*: An Overview*

Group bias is bias against members of an identifiable group distinguished on racial, religious, ethnic, or other suspect classifications. When a prosecutor uses peremptory challenges to strike prospective jurors because of group bias, he violates a criminal defendant's right to trial by a jury drawn from a representative cross-section of

the community under both the Fourteenth Amendment to the United States Constitution and article I, section 16 of the California Constitution. (*People v. Bell* (2007) 40 Cal.4th 582, 596 (*Bell*).) The federal constitutional right was established by *Batson*, and the California counterpart was recognized by *Wheeler*. (*Bell*, at p. 596.) The right applies to gender discrimination. (*People v. Jurado* (2006) 38 Cal.4th 72, 104.) The defendant need not be a member of the targeted group. (*Bell*, at p. 597.)

When a *Wheeler* motion is made, the trial court conducts a three-part inquiry. First, the defendant must make out a prima facie case by showing that the totality of the circumstances gives rise to a reasonable inference of discriminatory purpose. (*Bell*, *supra*, 40 Cal.4th at p. 596.) A prima facie case requires nothing more than evidence or circumstances that give rise to a reasonable inference of discrimination. (*Johnson v. California* (2005) 545 U.S. 162; *Bell*, at p. 596.) Second, if the defendant makes out a prima facie case of discriminatory purpose, the burden shifts to the prosecution to adequately explain its peremptory challenges by offering bias-neutral justifications for the strikes. Third, if such an explanation has been given, the trial court must decide whether the defendant has proven purposeful discrimination. (*Bell*, at p. 596.)

2. Jury Selection Proceedings Below

The first 18 prospective jurors included just two women: Juror Nos. 2078 and 1720. Juror No. 2078 stated that she was a married nurse with two children still living at home. She had been on a jury once before, but the case settled. She had been a crime victim several times, including two robberies at the shoe store where she once worked. She would not hold it against the defendant if he chose not to testify. Her mother's brother-in-law was in the legal community and she sometimes discussed with him cases she was working on. Her friends would say her major flaw was that she talked too much. Juror No. 2078's brother-in-law was convicted of spousal abuse; the family felt he was treated fairly. In addition, her ex-husband was "caught with drugs;" she did not have any bad feelings about the way the matter was handled by the authorities. Juror No. 2078 was almost a witness in court after she found a kidnapped two-year-old child; the authorities

treated her "fine" on that occasion.[4] Juror No. 2078 "kind of" grew up around gang members.

Juror No. 1720 stated that she was an accountant for a large corporation; she was divorced and had two small children. When she was a child, Juror No. 1720 was the victim of an attempted attack, but she never reported it. A friend was arrested for threatening neighborhood kids who were causing trouble; the friend was given "probationary hours." Juror No. 1720 felt the authorities overreacted and that the trouble-making kids should have been punished, too. She did not know whether the incident involved a gang, but she suspected that it did. Juror No. 1720 believed that there were some positive aspects to gangs: "[F]or some people, it is a community. For people that don't have people, maybe family, that is -- it becomes their family. But in the end, you know, the connotation of a gang has become very negative."

Defense counsel posed the following questions to Prospective Juror Nos. 1720 and 2078: "It seems that there's an abundance of males [on the prospective jury panel]. It's you and Juror No. [2078] currently that could possibly be selected. Would that bother you? Do you feel intimidated that, 'Oh, my goodness. All these men are there'? You have to listen to them and make a decision? [¶] [JUROR NO. 1720]: No. [¶] [DEFENSE COUNSEL]: Would you compromise your verdict just to say, 'You know

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[4] The somewhat confusing colloquy concerning this event was as follows: "THE COURT: And have you ever been a witness in a courtroom? [¶] [JUROR NO. 2078]: Almost. [¶] THE COURT: Okay. How do you almost become a witness? Were you on a list or something and didn't get called? [¶] [JUROR NO. 2078]: Because it was a closed courtroom. It was a two-year-old that was kidnapped, and they shut the court room down. And we were almost called because we found her. [¶] THE COURT: Okay. And you were not called. How long ago was that, by the way? [¶] [JUROR NO. 2078]: It was in '83. [¶] THE COURT: Were you treated okay by whoever was involved in bringing you to court and making you a witness? [¶] [JUROR NO. 2078]: At first, no, because they were going to arrest the parents. [¶] THE COURT: Were you the parents? [¶] [JUROR NO. 2078]: No. I was the one that found her-- [¶] THE COURT: Okay. [¶] [JUROR NO. 2078]: -- And took her out of the police car -- or took her out of the car. They had guns drawn and the whole bit. [¶] THE COURT: But how were you treated as a witness? Not the parents, but you. [¶] [JUROR NO. 2078]: I was treated fine."

what? I've got to agree with the fellas'? [¶] [JUROR NO. 1720]: No. I don't compromise anything. [¶] [DEFENSE COUNSEL]: How about you, [Juror No. 2078]? [¶] [JUROR NO. 2078]: No."

After the prosecutor used his first challenge to excuse Juror No. 2078 and his third to excuse Juror No. 1720, the defense counsel made the following objection: "This is the nature of a *Wheeler* motion. There are very few white females in the venire. [¶] . . . [¶] . . . There were two that were impaneled, both of which responded appropriately. Nothing that would, in my opinion, justify excusing them for cause. People seem to be exercising peremptories by removing all females from the panel." The trial court responded: "Well, it does turn out that there are only two females, but there are plenty of females in the audience. And I don't -- I didn't discern any pattern. I just don't think you've even made a prima facie case. [¶] For purposes of, I guess, appeal we are told to do this; so I'll do it, but I am making it clear I don't even think there's a prima facie case. But I'll ask the prosecutor for the reasons for the two." The prosecutor explained that Juror No. 2078 "said she talked too much. . . . Aside from that, it's kind of odd. I don't know what happened. She said she found a kidnapped girl. She said the parents weren't treated well. I don't know what that means. It just sounds very odd to me." As to Juror No. 1720, the prosecutor explained, "I kicked her because, when I asked her about whether or not any friends she knew had been arrested, she said a friend some time after 911 -- apparently he threatened some kids. And the impression I got from her, nothing should have happened, that he should have been allowed to threaten the kids. [¶] So that projects two things for me. One, she's of the mind that retaliation is okay. And, two, it leaves me with the impression she thinks the justice system didn't work well." The trial court concluded the matter with the observation: "Those reasons are there, but, again, I didn't find a prima facie case."

The sitting jury ultimately included two women.

3. Whether Defendant Established a Prima Facie Case of Discrimination Is Not Moot

Defendant first argues that whether defendant offered a first stage prima facie claim of discrimination is moot because the trial court ultimately ruled on the prosecutor's stated reasons for the two challenges. Under defendant's argument this court need only engage in a stage three analysis.

Trial courts are encouraged "to ask prosecutors to give explanations for contested peremptory challenges, even in the absence of a prima facie showing. [Citation.]" (*People v. Howard* (2008) 42 Cal.4th 1000, 1020 (*Howard*).) Explanations may be helpful on appeal because, if the appellate court disagrees with the trial court and finds a prima facie case was established, an appellate record exists for stage three review. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13 (*Bonilla*).) When a trial court expressly finds no prima facie case, but then invites the prosecution to justify its peremptory challenges, the prima facie point is not mooted as long as the trial court does not rule on the legitimacy of the prosecutor's reasons. In that situation, we independently review the record to determine whether, under the totality of the circumstances, the facts give rise to the prima facie inference of discriminatory purpose. (Compare *Howard*, at p. 1018 [question of whether prima facie case had been made is not mooted] with *People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8 [where the trial court requests "the prosecutor's reasons for the peremptory challenges and rules on the ultimate question of intentional discrimination. Thus, the question of whether defendant established a prima facie case is moot"].)

Here, we do not understand the trial court's comment, "[t]hose reasons are there," as a ruling on the ultimate question of whether the prosecutor engaged in intentional discrimination, the third stage of the *Wheeler* inquiry. Rather, the trial court's statement is best understood as an acknowledgment that the court had complied with our Supreme Court's recommendation that trial courts ask prosecutors to give explanations for contested peremptory challenges even in the absence of a prima facie showing. (*Howard*,

supra, 42 Cal.4th at p. 1020; *Bonilla*, *supra*, 41 Cal.4th at p. 343, fn. 13.) Considered in this light, whether defendant established a prima facie case is not moot.

4. The Totality of the Relevant Facts Do Not Demonstrate a Prima Facie Case

The trial court's conclusion that no prima facie case was established is to be upheld if either of two conditions exist. (*People v. Neuman* (2009) 176 Cal.App.4th 571, 579 and cases cited therein.) First, an examination of the record may provide substantial evidence to support the trial court's finding that a prima facie case has not been made. For example, the relevant statistics and patterns of the excused jurors may support the trial court's finding of no prima facie case. (*Neuman*, at p. 579; see also *People v. Kelly* (2007) 42 Cal.4th 763, 779-780 [types of evidence relevant to determination include whether most or all of the members of the identified group have been struck from the venire, use of a disproportionate number of peremptories against the group, the only characteristic shared by the jurors in question is their membership in the group, and the failure to engage these challenged jurors in more than desultory voir dire].) Second, the ruling is to be affirmed if the record contains bias-neutral grounds upon which the prosecutor might have challenged the jurors in question. (*Neuman*, at p. 579.)

Here, defendant was not a member of the same group as the challenged jurors (a woman), all women were not struck from the venire, the jurors in question shared other characteristics (including negative experiences with law enforcement), and there was no noticeable difference in the prosecutor's questioning of the jurors in question. These circumstances support the trial court's finding that no prima facie case was made.

In addition, Juror No. 1720 expressed some positive feelings with gangs in general and negative feelings about the manner in which law enforcement handled her friend's situation. That Juror No. 2078 might also have had an attitude toward gangs which could concern the prosecutor can reasonably be inferred from her comment that she grew up around gangs but said nothing about any negative experiences about gangs. And Juror No. 2078 also expressed negative feelings about the way the police handled the kidnapping, although she believed they treated her "fine." Positive feelings toward gangs

and negative feelings toward law enforcement are reasonable, bias-neutral reasons to exercise a peremptory challenge to a prospective juror.

5. The Prosecutor Offered Gender Neutral Justifications for His Challenges

Arguably the trial court's statement, "[t]hose reasons are there," meant the court agreed that the prosecution's justifications were supported by the record. In other words, the trial court made a stage three ruling; under *Lenix* such a ruling would render moot the issue of whether a prima facie case was established. Even if we were to agree with defendant that the trial court ruled under stage three, we would find no error. (*Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8.)

"A prosecutor asked to explain his conduct must provide a ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. [Citation.]" (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

We review the denial of a *Wheeler* motion after the prosecutor has explained his challenges under the deferential substantial evidence standard. (*Lenix*, *supra*, 44 Cal.4th at p. 613; *People v. Lewis* (2008) 43 Cal.4th 415, 470; *Bonilla*, *supra*, 41 Cal.4th at pp. 341-342.) We presume that the prosecutor used his challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. (*Lenix*, at p. 613.) Reversal is appropriate only if "the record as a whole shows purposeful discrimination," despite the neutral explanations given. (*People v. Silva* (2001) 25 Cal.4th 345, 384; see also *People v. Gonzales* (2008) 165 Cal.App.4th 620, 629.) Some types of evidence to be considered in making this determination are whether the party has used a disproportionate number of his peremptory challenges against the identified group and whether the only shared

characteristic among the challenged jurors is their membership in this group. (*Bonilla*, at p. 342.)

Here, substantial evidence supports a finding that the prosecutor's stated reasons for peremptorily challenging Juror Nos. 2078 and 1720 were not a pretext designed to disguise gender discrimination. The prosecutor's stated concerns for what these comments revealed about the prospective jurors –a positive feeling toward gangs and a negative feeling toward law enforcement –were comprehensible, not implausible and not discriminatory. Nor does comparative juror analysis show that the prosecutor's stated reasons were a sham. That another juror also described a "negative" experience with law enforcement but was not excused does not establish that the prosecutor harbored a discriminatory purpose in excusing Juror Nos. 2078 and 1720.

B. *The Verdict Was Not Coerced*

Defendant contends he was denied due process as a result of the trial court coercing the deadlocked jury to return a unanimous verdict. He argues that the trial court's inquiry into the numerical breakdown of the deadlocked jury was coercive under the circumstances of this case. We find no error.

A trial court is obligated to assess the likelihood that a deadlocked jury may be able to reach a verdict after further deliberation. (Pen. Code, § 1140.) The determination of whether there is a reasonable probability of agreement rests within the trial court's discretion. (*People v. Miller* (1990) 50 Cal.3d 954, 994.) In exercising its discretion, the trial court is entitled to ask the breakdown of the jury's votes without asking whether the majority favored guilt or innocence. (*People v. Proctor* (1992) 4 Cal.4th 499, 538; *Miller*, at p. 993.) While theoretically there may be greater potential for coercion once the trial court learns that a unanimous judgment is being hampered by a single holdout juror, allowing the jury to continue its deliberations in that circumstance is not inherently coercive. (*Bell, supra*, 40 Cal.4th at p. 617.) "In such a case, the judge's remarks to the deadlocked jury regarding the clarity of the evidence, the simplicity of the case, the necessity of reaching a unanimous verdict, or even the threat of being 'locked up for the

night' might well produce a coerced verdict. [Citations.]" (*People v. Sheldon* (1989) 48 Cal.3d 935, 959-960 (*Sheldon*).) It is error for a trial court to give an instruction which either (1) encourages jurors to reexamine their views in light of the numerical division of the jury, (2) states or implies that if the jury fails to agree the case will necessarily be retried, or (3) refers to the expense and inconvenience of a retrial. (*People v. Hinton* (2004) 121 Cal.App.4th 655, 659 (*Hinton*), citing *People v. Gainer* (1977) 19 Cal.3d 835, 852.) In this case, nothing the trial court said or did realized the potential for coercion.

Here, the jury deliberated for half an hour on May 20, 2008. The next day, interspersed with readbacks and questions, they deliberated for another few hours and at a little after 4:00 p.m. reported that they were deadlocked. The next morning, the trial court reiterated for the record what it told counsel the night before: the jury was deadlocked and one of the jurors had to leave by noon.[5] It told the jury they would have to continue deliberating, but asked whether there was anything the court could do "by way of jury instructions, readback, or anything that the court can do -- but there's a lot of things I can't do -- anything that legally I can do that you think would be helpful in helping the jury continue in its deliberation?" In response to a juror request, the trial court re-read the reasonable doubt and expert witness instructions and the pretrial admonition to not be influenced by prejudice or passion. In response to another juror's request for "examples [of] this notion of proof beyond a reasonable doubt," the trial court explained that it could not give any examples because "when a judge elaborates on the jury instructions, they reference it on appeal because there's something I might say that's not a hundred percent correct . . . . And so as a result, judges are loath to give examples because we're sort of told not to do that." The trial court elaborated: "If I said anything even, you know, a period or apostrophe wrong, that would cause a reversal because I

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[5] The trial court explained that this juror had been promised that she would be excused for hardship if the trial went beyond May 22, 2008, because she was scheduled to start a new job that afternoon; anticipating that this might happen, four alternates had been selected.

have a jury instruction that says exactly what you're supposed to say." After offering to have the lawyers briefly re-argue "a particular area of evidence that you're having difficulty with . . . ," the trial court concluded: "I don't have to do this, and I don't want to influence you in any way, but I am going to lift the admonition and just have you tell me, what is the breakdown of the jury? I don't want you to tell me whether it's for guilty or not guilty. I just want you to tell me what are the numbers. Is it 10-2, 11-1, 9-3, 6-6?" The foreperson responded: "11-1," but later clarified that the correct numbers were "10-2." The trial court instructed the jury to continue deliberating "keeping in mind how important this is to both sides." Later that afternoon, the jury announced its verdict.

None of the trial court's comments can reasonably be construed as coercive. The trial court did not suggest that the evidence was clear or the case simple; it did not tell the jurors that they had to reach a unanimous decision and would lock them up if they did not. (Cf. *Sheldon*, *supra*, 48 Cal.3d at pp. 959-960.) It did not encourage the jurors to consider their numerical division. (*Hinton*, *supra*, 121 Cal.App.4th at p. 659.) The possibility of deliberations beginning anew with an alternate juror after a little more than a day cannot reasonably be viewed as coercive in light of the fact that both sides knew in advance that this was a possibility. Finally, the trial court's explanation for its refusal to give examples of reasonable doubt (because to do so might result in a reversal) did not suggest that the trial court favored a particular verdict. Nor did these comments imply that the case would necessarily be retried if they failed to agree, or refer to the expense and inconvenience of retrial. (*Hinton*, *supra*, 121 Cal.App.4th at p. 659.)

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

BIGELOW, J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.